

feeted is afforded reasonable opportunity to submit to the jury all the facts on the issue.

It is not an unreasonable inference that a derailment of railway cars is due to negligence in construction, maintenance or operation of the track or of the train, and the provisions of § 1985 of the Mississippi Code of 1906, making proof of injury inflicted by the running of cars or locomotives of a railway company *prima facie* evidence of negligence on the part of servants of the company, does not deprive the companies of their property without due process of law or deny to them the equal protection of the law.

Such a statute in its operation only supplies an inference of liability in the absence of other evidence contradicting such inference.

THE facts, which involve the constitutionality under the equal protection clause of the Fourteenth Amendment of certain provisions of the Code and of the constitution of the State of Mississippi, are stated in the opinion.

*Mr. James N. Flowers* for plaintiff in error:

Section 3559, Annotated Code, as now construed by the Supreme Court of Mississippi, violates the Fourteenth Amendment in that it denies to railroad corporations the equal protection of the laws. Said section is constitutional as construed by that court in *Ballard v. Cotton Oil Co.*, 81 Mississippi, 507, and *Bradford Construction Co. v. Heflin*, 88 Mississippi, 362. That state statutes may abolish the fellow-servant rule in part as to employés of railroad companies and leave it in full operation as far as it affects the rights of servants of other masters is conceded, *Minneapolis &c. Ry. Co. v. Herrick*, 127 U. S. 210; *Tullis v. Lake Erie &c. Ry. Co.*, 175 U. S. 348; *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205; *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, but they can do so only as to such employés as are imperilled by the hazardous nature of the business of operating railroad trains. A trackman is in no more danger from the operation of trains than is a telegraph operator.

The statute cannot be consistently applied to the case

of employ  s, except those who take part in the actual operation of trains, or whose duties expose them to dangers from the actual operation of trains. The dangerous part of the railroad business, which justifies the classification of it as a dangerous business, is the running of trains. The statute only applies to those who take part in such dangerous business, or whose duties expose them to such dangers.

To determine whether the person injured is entitled to the protection of    193 of the state constitution, one should not look at the character of the employment of the person whose negligence caused the injury, but to the character of the employment of the person who was himself injured.

In this case the man killed was engaged in no dangerous business. His injuries did result from a running train, the said train having been derailed and turned over on him.

The deceased was not even engaged about the duties of his employment at the time he was hurt, but had stopped at the noon hour and was walking along the track. His duties did not require him to be where he was. It was a place of his own selection. He cannot be said to have been engaged in a dangerous employment just because he worked on the track and a train running along the track might jump the track and fall on him. *Railway Co. v. Mackey*, *supra*; *Tullis v. Railroad Co.*, 175 U. S. 351; *Blomquist v. Great Northern R. R. Co.*, 65 Minnesota, 69; *Jemming v. Great Northern R. R. Co.* (Minn.), 1 L. R. A. (N. S.) 702; *Anderson v. Railroad Co.*, 74 Minnesota, 432.

Cases allowing the railroad employ   to plead such statutes have proceeded on the idea that the particular branch of employment was hazardous. *Railroad Co. v. Pontius*, 157 U. S. 200; *Dunn v. Railroad Co.*, 107 N. W. Rep. 616; *Callahan v. Railroad Co.*, 170 Missouri, 473, affirmed in 194 U. S. 826.

In the effort to make it easy to fasten liability upon

railroad companies the Mississippi legislature has gone to the extreme. The necessary effect of § 1985 of the Mississippi Code of 1906 is to make railroad corporations liable in every instance of damage to persons or property unless it is able to meet successfully the burden of proving its innocence. The burden of proof is shifted to the defendant and railroad corporations are put in a class to themselves. It is legislation directed specially against railroads. There is no reason in the classification. It is arbitrary and makes it easier to recover against railroad defendants than against any other defendants. It is a burden put upon them which is put upon no other class of litigants.

The inherent danger of railroading is not a matter to be taken into consideration in the enactment of rules of evidence or of law pertaining to the enforcement of rights of action for injuries inflicted by running trains. The "difference" between railroad companies and other persons and corporations in this regard does not bear a reasonable and just relation to the subject in respect of which the classification is proposed, and therefore such classification is arbitrary. *Atchison, T. & S. F. R. R. Co. v. Matthews*, 174 U. S. 96.

The statute, although upheld, was recognized as being on the border line; four members of this court condemned it. *Missouri Pacific R. R. Co. v. Humes*, 115 U. S. 512; *Railroad Co. v. Paul*, 173 U. S. 404, distinguished; and see *Ballard v. Oil Co.*, *supra*; *Bradford Construction Co. v. Heflin*, *supra*; *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150.

This statute will bear upon railroad companies in a discriminating and unequal way and deprive them of their property without due process of law. No law authorizing persons to recover of railroad companies on unjust and illegal claims can be justified on grounds of public policy.

*Mr. C. H. Alexander* and *Mr. Chalmers Alexander* for defendant in error:

The work in which Hicks was engaged was such as habitually placed him within the hazards contemplated by the Mississippi constitution. See cases in opinion of state court and *Keatley v. I. C. R. R. Co.*, 103 Iowa, 282; *Haden v. R. R. Co.*, 92 Iowa, 227; *Dunn v. Chicago R. R. Co.*, 130 Iowa, 580; *Jenning v. R. R. Co.*, 1 L. R. A. (N. S.) 702; *Williams v. R. R. Co.*, 121 Iowa, 270; *Croll v. Atchison R. R. Co.*, 57 Kansas, 548; *Brown v. Yazoo R. R. Co.*, 88 Mississippi, 687. It is applicable to all railroad companies, hence there is no injustice in the operation of the statute. For similar statutes see § 3148 of the general statutes of Florida, 1906. For Arkansas see *Sand. & H. Dig.*, § 6349. For Georgia see 73 Georgia, 499; 79 Georgia, 305. For Alabama see *Georgia Cent. R. R. Co. v. Turner*, 145 Alabama, 441. For North Carolina, 120 N. C. 489. For Tennessee see *Horn v. Railroad Co.*, 1 Coldw. 72. For Colorado, Kentucky, Maryland, Louisiana, North Dakota, South Carolina and other States see the numerous citations in 33 Cyc. 1274.

MR. JUSTICE LURTON delivered the opinion of the court.

This was an action in tort for the wrongful killing of Ray Hicks, a section foreman in the service of the railroad company. There was a judgment for the plaintiff in a circuit court of the State of Mississippi, which was affirmed by the Supreme Court of the State.

The Federal questions asserted, which are supposed to give this court jurisdiction to review the judgment of the Supreme Court of the State, arise out of the alleged repugnancy of §§ 3559 and 1985 of the Mississippi Code to that clause of the Fourteenth Amendment of the Constitution which guarantees to every person the equal protection of the laws.

Section 3559 of the Mississippi Code of 1892, being a rescript of § 193 of the Mississippi constitution of 1890, abrogates, substantially, the common law fellow-servant rule as to "every employé of a railroad corporation." It is urged that this legislation, applicable only to employés of a railroad company, is arbitrary, and a denial of the equal protection of law, unless it be limited in its effect to employés imperiled by the hazardous business of operating railroad trains or engines, and that the Mississippi Supreme Court had, in prior cases, so defined and construed this legislation. *Ballard v. Mississippi Cotton Oil Co.*, 81 Mississippi, 532; *Bradford Construction Co. v. Heflin*, 88 Mississippi, 314.

It is now contended that the provision has been construed in the present case as applicable to an employé not subject to any danger or peril peculiar to the operation of railway trains, and that therefore the reason for such special classification fails, and the provision so construed and applied is invalid as a denial of the equal protection of the law.

This contention, shortly stated, comes to this, that although a classification of railway employés may be justified from general considerations based upon the hazardous character of the occupation, such classification becomes arbitrary and a denial of the equal protection of the law the moment it is found to embrace employés not exposed to hazards peculiar to railway operation.

But this court has never so construed the limitation imposed by the Fourteenth Amendment upon the power of the State to legislate with reference to particular employments as to render ineffectual a general classification resting upon obvious principles of public policy because it may happen that the classification includes persons not subject to a uniform degree of danger. The insistence, therefore, that legislation in respect of railway employés generally is repugnant to the clause of the Constitution

guaranteeing the equal protection of the law merely because it is not limited to those engaged in the actual operation of trains is without merit.

The intestate of the defendant in error was not engaged in the actual operation of trains. But he was nevertheless engaged in a service which subjected him to dangers from the operation of trains, and brought him plainly within the general legislative purpose. The case in hand illustrates the fact that such employés, though not directly engaged in the management of trains, are nevertheless within the general line of hazard inherent in the railway business. The deceased was the foreman of a section crew. His business was to keep the track in repair. He stood by the side of the track to let a train pass by; a derailment occurred and a car fell upon him and crushed out his life.

In the late case of *L. & N. Railroad v. Melton*, 218 U. S. 36, an Indiana fellow-servant act was held applicable to a member of a railway construction crew who was injured while engaged in the construction of a coal tippie alongside of the railway track. This whole matter of classification was there considered. Nothing more need be said upon the subject, for the case upon this point is fully covered by the decision referred to.

The next error arises upon the constitutionality of § 1985 of the Mississippi Code of 1906. That section reads as follows:

"Injury to Persons or Property by Railroads *prima facie* Evidence of Want of Skill, etc.—In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employés of railroad companies."

The objection made to this statute is that the railroad

applied by the Mississippi court in this case is unobjectionable. It is not an unreasonable inference that a derailment of railway cars is due to some negligence, either in construction or maintenance of the track or trains, or some carelessness in operation.

From the foregoing considerations it must be obvious that the application of the act to injuries resulting from "the running of locomotives and cars," is not an arbitrary classification, but one resting upon considerations of public policy arising out of the character of the business.

*Judgment affirmed.*

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